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Digital trade in Asia Pacific FTAs — building blocks for global rules

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The Comprehensive Progressive Trans Pacific Partnership Agreement (CPTPP) contains the most comprehensive rules on e-commerce and digital trade of any FTA to date. It establishes reference points for new standards in trade agreements in the region – as demonstrated by the recently negotiated update of NAFTA among the US, Mexico and Canada (USCMAⁱ).

The CPTPP can be expected to inform approaches to regulation of digital services and data in other Asia Pacific FTAs, and potentially, the negotiation of multilateral rules on digital trade.

International rules matter for digital trade. They create binding commitments which reduce barriers, address regulatory gaps and facilitate the flow of services and data across borders. They can provide frameworks for countries to improve their regulatory systems. They deliver greater certainty to business.

Negotiating these rules at the multilateral level raises serious challenges. It also presents an opportunity for APEC to contribute to emerging global rules at a time when the WTO system is at a critical juncture.

Negotiation of digital trade rules can draw on APEC's work on regulation of data privacy and cyber-security, services policy and liberalisation. APEC can play a role in advancing international cooperation to ensure negotiating priorities reflect the current needs of economies, business and consumers.



CPTPP leads the way

The CPTPP is the first agreement to regulate digital trade and promote internet based commerce in a comprehensive way. The agreement has an e-commerce chapter, intended to clarify the rules around movement of data between member countries and keep information flowing freely.

Key provisions are summarised in the table below:

Commitment	Obligation
Cross border data flows	Guarantees the free flow of data across borders by service suppliers and investors where it is part of business activity. This right is subject to public interest regulation for security, privacy, and other legitimate goals.
Non discrimination	Mandates that digital products and services are treated the same as non-digital products
Location of computing facilities (data localisation)	Bans data localisation requirements for computing facilities. TPP-11 countries cannot force businesses to build data storage centres or use local computing facilities in the TPP-11 market they are seeking to access. The prohibition is not absolute. Governments may restrict the location or use of computing facilities in order to achieve legitimate public policy objectives (such as data privacy). The ban on data localisation does not apply to financial institutions and cross-border financial services suppliers.
Source code	Prohibits mandatory transfer of or access to source code of software as a condition of doing business in another party.
Customs duties	Bans customs duties (but not non discriminatory local consumption or sales taxes) on electronic content or transmissions including video games, music, software and other digital products.
New services	Provides for automatic market opening of 'new services' sectors unless members explicitly decide to close them. This encourages innovation and helps prevent future discrimination.
Consumer protection	Mandates frameworks for legal protection of consumer privacy and personal information.
Data protection	Encourages countries to adopt mechanisms that promote compatibility and interoperability between different data protection frameworks, including principles and guidelines of international bodies

CPTPP also recognises the 'global nature of e-commerce' and supports cooperation' in regional and multilateral fora to promote the development of electronic commerce.'



A regional model?

The recently negotiated update of the North American Free Trade Agreement (NAFTA) among the United States, Mexico and Canada (USMCA) incorporates and builds on CPTPP provisions and in some instances, goes further to promote cross-border data flows.

It has a chapter dedicated to digital trade issues which contains new commitments not present in CPTPP or prior FTAs. This includes:

- protection for internet service providers from liability for the actions of their usersⁱⁱ
- provisions to promote (but not require) the publication of open government dataⁱⁱⁱ
- language aimed mitigating evolving cybersecurity threats through risk based approaches consensus-based standards and risk management best practices. It requires parties to collaborate on cybersecurity issues.

The USMCA also strengthens and expands upon some CPTPP provisions. For example, there are stronger obligations prohibiting data localisation. Unlike CPTPP these obligations extend to financial services, provided financial regulators have access to data needed to fulfil their regulatory mandate.^{iv} Protection from mandatory transfers of source code is extended to algorithms expressed in source code. This allows parties to enact algorithmic transparency mandates for all firms, both foreign and domestic.

Rules governing e-commerce are also currently being negotiated in other FTAs involving Asian Pacific economies, such as the Pacific Alliance FTA (involving Chile, Peru, Mexico, Colombia plus Australia, New Zealand, Singapore and Canada), and the Regional Comprehensive Economic Partnership Agreement (RCEP – involving East Asia plus Australia, New Zealand and India).

Not all agreements are expected to deal with digital trade as comprehensively as CPTPP or the USMCA due to diverging approaches to data regulation, but will include provisions designed to ease the flow of data and services across borders.



Frameworks for data privacy

An interesting inclusion in the USMCA is the endorsement of APEC approaches on data privacy. The agreement specifically refers to the APEC Cross Border Privacy Rules (CBPR) System as a 'valid mechanism to facilitate cross-border information transfers while protecting personal information' between the parties. Parties are encouraged to take into account the APEC Privacy Framework in the development of their legal framework for the protection of personal information, as well as principles and guidelines of relevant international bodies.

The CBPR is a voluntary, principles based framework for the development and implementation of data privacy policies aimed at establishing effective privacy protections and promoting electronic commerce throughout the Asia Pacific region. Participating economies include Australia, the United States (US), Mexico, Japan, Canada, Singapore, and Korea.^v

USMCA also commits parties to 'maintain a dialogue on the promotion and development of mechanisms, including the APEC Cross-Border Privacy Rules, that further global inter-operability of privacy regimes; and to participate actively in regional and multilateral fora to promote the development of digital trade'.

Multilateral moves - Asia Pacific reference points

CPTPP e-commerce provisions can be used to inform approaches to address ecommerce and digital trade in other regional FTAs. The agreement offers a model which can be scaled up (as in the USMCA) or scaled down as base from which to build future commitments (as in RCEP), depending on the needs of FTA parties. US business has already flagged a possible US/Japan bilateral FTA as a platform for negotiation of standard setting rules on digital trade.^{vi}

APEC's cross-border privacy framework can serve as the blueprint for regional rules for data transfer, privacy and enforcement. There already exists between APEC CBDPR members a level of consumer, business and regulator trust in cross border flows of personal information which can be built on and bound into trade agreements.

Both Asian Pacific FTA models and APEC principles can contribute to the development of international rules on digital trade. At the very least they bring to the



table a suite of issues for discussion on globally acceptable approaches to regulation of digital services and data.

This is particularly relevant given recent moves in the WTO to negotiate a plurilateral agreement on e-commerce among willing WTO members. In October 2018 the US, Japan, and the European Union committed to the 'timely launch' of negotiations on a broad e-commerce deal aimed at inhibiting digital protectionism and enhancing 'business environments through the promotion of data security.' They aim to move from discussions to negotiations on 'possible elements to be included in a future agreement on digital trade in 2019.' It follows the launch of a 2017 initiative in the WTO (by Australia, together with Japan and Singapore) to work toward future negotiations on electronic commerce, including on data and services.

Digital trade issues are also likely to be a key topic of discussion among the G20 countries in 2018/19. The digital economy and services and regional connectivity are key themes in APEC in 2019 with Chile as host.

Not so fast...

A global agreement digital trade will be a long term process. It will need to reconcile serious differences in regulatory approaches and varying levels of data regulation among participating economies (notably between the EU and US and also among APEC members).

Previous plurilateral negotiations among WTO members on trade in services (TiSA) were unable to resolve an impasse on treatment of cross border data flows between the EU and the US. Data transfer restrictions under the EU's General Data Protection Regulation is at odds with prohibitions on data transfers in the CPTPP. Many economies in Asia Pacific have laws on data localisation.

More bilateral FTAs with provisions regulating e-commerce and trade can be expected to emerge long before WTO rules are negotiated - for example in the RCEP, Pacific Alliance, and possibly key bilateral deals involving the US (Japan, UK).

Agreeing on global rules raises serious challenges. But it also presents an opportunity for APEC to contribute to emerging global rules at a time when the WTO system is at a critical juncture.



Role for APEC

How can APEC help to address these challenges and foster international rules which encourage open and competitive services and use of data?

The negotiation of provisions in trade agreements governing digital trade can draw on APEC's work on regulation of data privacy and cybersecurity, services policy and liberalisation. Data privacy rules are just one example of a regionally accepted framework which can form the basis for binding regulatory outcomes.

APEC can advocate the value of commitments in FTAs to support cooperation at the multilateral and regional level on development of principles to guide regulation of digital trade.

It can support new rules which complement current rules governing goods and services in the WTO and existing FTAs.

As pointed out by the Chair of APEC's Economic Committee, 'Regulations should be appropriate to evolving technologies and address the concerns of stakeholders without creating unnecessary burdens and obstacles for entrepreneurs'. APEC is also uniquely placed in the region to encourage its members to exchange policies and best practices on how to regulate the internet and the digital economy; bring experts together to develop a next-generation approach to regulating the digital economy; and consult with private sectors and other agencies to ensure negotiating priorities reflect the current needs of economies, business and consumers.



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ⁱ Not yet in force. CPTPP will enter into force December 30 2018.

ⁱⁱ This obligation does not apply to Mexico for three years from entry into force.

ⁱⁱⁱ The agreement encourages adherence to best practices for open data, including ensuring it is in open, machine-readable formats.

^{iv} This obligation does not apply to Canada for one year. The rest of the digital trade chapter does not apply to financial services.

^v See <http://cbprs.org/GeneralPages/About.aspx> and <https://www.ag.gov.au/consultations/pages/APEC-cross-border-privacy-rules-public-consultation.aspx>

^{vi} The scope of a US/Japan FTA is yet to be determined. The US cannot formally begin negotiations until January 2019. It is currently conducting a process of public consultation on US negotiating objectives. See <https://www.federalregister.gov/documents/2018/10/26/2018-23569/request-for-comments-on-negotiating-objectives-for-a-us-japan-trade-agreement>